

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

JOSEPH FREDERICK, )  
)  
Claimant-Below, )  
Appellant, )  
)  
v. )  
)  
A-DEL CONSTRUCTION CO., )  
INC., )  
)  
Employer-Below, )  
Appellee. )

C.A. No.: N21A-12-010 CLS

Date Submitted: August 17, 2022

Date Decided: November 9, 2022

*Upon Consideration of Appellant Joseph Frederick's Appeal from the Industrial  
Accident Board. **AFFIRMED.***

**ORDER**

Jonathon B. O'Neill, Esquire, Kimmel, Carter, Roman, Peltz & O'Neill P.A.,  
Christiana, Delaware, Attorney for Appellant Joseph Frederick.

John W. Morgan, Esquire, Heckler and Frabizzio, Wilmington, Delaware and  
Tracey A. Burleigh, Esquire, Marshall Dennehey Warner Coleman & Goggin, P.C.,  
Wilmington, Delaware, Attorneys for Appellee A-Del Construction Co., Inc.

**SCOTT, J.**

## **INTRODUCTION**

Before this Court is Appellant Joseph Frederick's ("Mr. Frederick") appeal from the Industrial Accident Board's (the "Board") decision to terminate benefits. For the following reasons, the decision of the Board is **AFFIRMED**.

## **BACKGROUND**

On March 28, 2016, Mr. Frederick sustained injuries to his face, head, neck and back while driving a dump truck for A-Del Construction Co., Inc. ("Employer"). Since March 29, 2016, Employer paid total disability rate of \$632.95 per week. On January 28, 2019, Employer filed its first Petition for Review to Terminate Benefits ("First Petition") and asserted Mr. Frederick could return to full-time sedentary work with restrictions. A hearing was held on July 8, 2019 for the First Petition. Dr. Andrew Gelman ("Dr. Gelman") and Mr. Charles Fairer ("Mr. Fairer") testified in support for termination of benefits. Mr. Frederick's treating physician Dr. James Zaslavsky ("Dr. Zaslavsky") and Mr. Frederick's ex-wife Sue Frederick testified as to why Mr. Frederick was still totally disabled and entitled to continued benefits. After review of the First Petition, the hearing and evidence, the Board ruled Mr. Frederick was still totally disabled and unable to work.

On March 30, 2021, Employer filed its second Petition to Review to Terminate Benefits, the subject of this appeal, asserting total disability benefits should be terminated as Mr. Frederick can return to work with restrictions. On

October 21, 2021, a hearing took place before a Hearing Officer of the Board. At the hearing, Employer called Dr. Gelman, again, Truman Doyle Perry III, who performed a labor market survey, and presented surveillance footage of Mr. Frederick walking to his vehicle. Mr. Frederick testified on behalf of himself and his physician, Dr. Zaslavsky testified, again. On December 2, 2021, the Board granted the Second Termination Petition and awarded partial disability benefits and expenses.

In its decision, the Board accepted Dr. Gelman as very familiar with Mr. Frederick, as he performed seven examinations since the work accident. In describing the differences between the First Petition hearing and this present one, the Board commented on the significant changes occurring during the interim, including surgery, changes to pain management, improvement of medical condition, and more detailed concerns about Mr. Frederick's credibility.

The Board noted there were differences between how Mr. Frederick presented himself at the hearing and at doctors' appointment, then how he appeared on surveillance footage where he was seen walking without a cane, walker or roller device and was observed walking without appearing awkward or in a bent position. Because Dr. Zaslavsky relied upon Mr. Frederick's presentation of his symptoms, Mr. Frederick's credibility impacted Dr. Zaslavsky's opinions. The credibility of Mr. Frederick continued to decline due to inconsistent drug screens in 2020, which

lacked explanation from Mr. Frederick and his physician, along with Mr. Frederick's refusal to follow recommendations from his new pain management specialist. The Board found Mr. Frederick's decision to present to the hearing without taking medication to be misleading and unhelpful, suggesting it showed Mr. Frederick in his worst possible condition and not his condition under regular treatment and prevented the Board from assessing the validity of his alleged side effects.

This appeal followed the December 2, 2021 Board decision. On appeal, Mr. Frederick argues one ground: the hearing officer's decision that he is not totally disabled and can work full time in restricted capacity is not supported by substantial evidence. Specifically, Mr. Frederick argues the critical witnesses and "gist" of their testimony remained the same or very similar from the First Petition hearing and this hearing, the hearing office should have accepted Dr. Zaslavsky's testimony over Dr. Gelman like the decision from the First Petition. Dr. Zaslavsky testified Mr. Frederick was totally disabled, and because Dr. Zaslavsky was Mr. Frederick's treating physician, Mr. Frederick argues his physician's opinion should've been given substantial weight. Additionally, Mr. Frederick argues that Dr. Gelman seeing Mr. Frederick only seven times should not have made his testimony been more credible than Dr. Zaslavsky's as Dr. Zaslavsky performed four surgeries on Mr. Frederick and saw him close to forty times. Mr. Frederick continues his argument by baselessly trying to underline the findings of the hearing officer, including

claiming the use of the surveillance footage to discredit Mr. Frederick's credibility and ability to work lacks standard for substantial evidence.

### **STANDARD OF REVIEW**

On appeal from the Industrial Accident Board, the Superior Court must determine if the Board's factual findings are supported by substantial evidence in the record and free from legal error.<sup>1</sup> In reviewing the actions of the agency, the Court is required "to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did."<sup>2</sup> "Therefore, every part of the record before an administrative agency which is necessary to a review of its decision must be made part of the record brought before this Court."<sup>3</sup> The Court does not "weigh evidence, determine questions of credibility or make its own factual evidence findings."<sup>4</sup>

### **DISCUSSION**

The only issue before this Court is whether there is substantial evidence to support the Board's finding. The IAB may adopt the opinion testimony of one expert over another; and that opinion, if adopted, will constitute substantial evidence for

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<sup>1</sup> *Bedwell v. Brandywine Carpet Cleaners*, 684 A.2d 302, 304 (Del. Super. 1996) (citing *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960)).

<sup>2</sup> *Nat'l Cash Register v. Riner*, 424 A.2d 669, 674–75 (Del. Super. 1980).

<sup>3</sup> *Perrine v. State*, 1994 WL 45341, at \*1 (Del. Super.) (citing *Henry v. Dep't of Labor*, 293 A.2d 578, 581 (Del. Super. 1972)).

<sup>4</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 67 (Del. 1965).

purposes of appellate review.<sup>5</sup> Similarly, the IAB may accept or reject an expert's testimony in whole or in part<sup>6</sup> and the Board may give substantial weight to the treating physician's opinion, it is not bound to follow the treating physician's opinion.<sup>7</sup> Additionally, the Board is permitted to accept an expert it previously rejected, so long as the acceptance is based upon new and credible evidence such as examinations that occurred after the previous hearing.<sup>8</sup>

Here, the Board identifies why it chose Dr. Gelman's testimony over Dr. Zaslavsky. The Board did so for the following reasons: (1) Dr. Zaslavsky's testimony was intrinsically linked to Mr. Frederick's credibility, as the doctor based his opinions on Mr. Frederick's presentation and statement, and Mr. Frederick's credibility was called into question; (2) Dr. Zaslavsky was not aware of the inconsistent drug screens until he was deposed and did not provide explanation for the inconsistencies; (3) Dr. Zaslavsky's evaluation regarding Mr. Frederick's work capabilities was done without seeing Mr. Frederick on medications in his normal treated condition. All the stated reasons for the Board choosing Dr. Gelman's testimony over Dr. Zaslavsky, including the observation of the surveillance footage,

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<sup>5</sup> *Bullock v. K-Mart Corp.*, 1995 WL 339025, at \*3 (Del. Super. May 5, 1995).

<sup>6</sup> *Turbitt v. Blue Hen Lines, Inc.*, 711 A.2d 1214, 1215 (Del. 1998).

<sup>7</sup> *Wyatt-Helie v. Platex Apparel*, 2006 WL 2904459, at \*3 (Del. Super. Sept. 6, 2006).

<sup>8</sup> *Blackstock v. J.S. Alberici Constr., Co., Inc.*, 2000 WL 145820, at \*3 (Del. Super. Jan. 28, 2000).

represent new and credible evidence allowing the Board to discredit Dr. Zaslavsky's testimony, which they had previously accepted.

The Court is bound by the record before it on appeal and may not weigh evidence, determine questions of credibility or make its own factual evidence findings. Mr. Frederick complains the use of the surveillance footage to discredit his credibility and ability to work lacks standard for substantial evidence. However, this Court cannot look at such surveillance footage and determine if it reflects Mr. Frederick's credibility. This Court is bound by the Board finding the surveillance footage reflected poorly upon the Board's perception of Mr. Frederick's credibility as the Board found Mr. Frederick walked noticeably differently than he presented to the hearing and to doctors. The Court finds, after reviewing all the testimony and exhibits before the agency to render its decision, the Board fairly and reasonably reach the conclusion.

### **CONCLUSION**

For the foregoing reasons, the Board's decision is **AFFIRMED**.

/s/ Calvin L. Scott  
**Judge Calvin L. Scott, Jr.**